

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1956-CR

Cir. Ct. No. 2010CF1168

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH L. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Keith Williams appeals a judgment of conviction for five misdemeanors and four felonies, all related to domestic abuse incidents. Williams also appeals an order denying his postconviction motion. Williams

seeks resentencing, arguing the circuit court relied on erroneous information at sentencing. We reject Williams' argument and affirm.

BACKGROUND

¶2 Following a jury trial, Williams was convicted of five counts of misdemeanor battery, two counts of felony strangulation and suffocation, one count of felony false imprisonment, and one count of felony intimidation of a victim, all counts charged as repeaters and with domestic abuse enhancers. The crimes were all committed against the same victim and occurred on four days over a one-month period.

¶3 At sentencing, the State addressed Williams' prior conviction for child abuse—recklessly causing harm, for physically assaulting a twelve-year-old boy. The State asserted, “As a result of Mr. Williams' assaultive behavior, the child suffered a fractured wrist and ankle.” This assertion was a direct quote from the presentence investigation report (PSI).

¶4 Williams later moved for postconviction relief, contending he was sentenced on inaccurate information because the child victim did not suffer any fractures. The court denied the motion, reasoning the sentencing court had not actually relied on the erroneous information.¹ Williams now appeals.

¹ Judge Mark A. Warpinski presided over the sentencing hearing. Following Judge Warpinski's retirement, Judge Thomas J. Walsh presided over the postconviction proceedings.

DISCUSSION

¶5 Williams argues the sentencing court relied on erroneous information. Criminal defendants have a due process right to be sentenced on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. This includes information pertaining to “the offense and the circumstances of its commission ... and the defendant’s personality, social circumstances and general pattern of behavior.” *State v. Perez*, 170 Wis. 2d 130, 140, 487 N.W.2d 630 (Ct. App. 1992) (citations omitted). “Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo.” *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶6 To be entitled to resentencing, Williams “must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information.” *Id.*, ¶¶2, 31. The test for actual reliance is “whether the court gave ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Id.*, ¶14 (quoting *Welch v. Lane*, 738 F.2d 863, 866 (7th Cir. 1984)). Williams must show the court’s actual reliance by clear and convincing evidence. *See State v. Harris*, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409. To satisfy this standard, Williams must “provide evidence indicating that it is ‘highly probable or reasonably certain’ that the circuit court actually relied” on inaccurate information. *Id.*, ¶35. If Williams establishes actual reliance, then the burden shifts to the State to prove that the error was harmless. *See id.*, ¶32.

Inaccurate information at sentencing

¶7 Williams argues the sentencing court received inaccurate information because the child abuse victim did not suffer any fractures as a result

of the assault. Williams relies on two sources. First, a hospital radiology report states:

FINDINGS:

....

Views of the feet demonstrate irregularity seen along the diaphysis of the right fourth metatarsal. This may be due to the patient's exostoses or possibly secondary to old trauma. No definite acute fractures. Views of the forearms and hands demonstrate an irregularity along the mid shaft of the left distal radius, also possibly from old trauma versus a unilateral Madelung's deformity.

....

IMPRESSION:

Findings consistent with widespread multiple hereditary exostoses.

No definite acute fractures.

Irregularity along the fourth metatarsal may be related to exostoses or possibly chronic trauma. Irregularity along the diaphysis of the left radius is chronic in appearance. Underlying bone lesion or sequelae of old trauma is not excluded. There is also some angulation in the distal radius, which also appears congenital or chronic. ...

¶8 Williams also relies on the sentencing transcript from the child abuse case, where the State indicated its agreement with the court's view that the medical record was a more reliable source of information than the PSI regarding the victim's injuries. The PSI in that case stated, "It was substantiated that ... as a result of the beating ..., two old fractures, one to [the victim's] wrist and one to his ankle, were located when he was taken to [the hospital] for x-rays." Judge Sue E. Bischel stated:

I am not convinced that this child's wrist and ankle were broken. And Ms. [redacted], that's not what the medical records say. Now, I don't know what you base that on[, w]hy you believe that. But that is not what the medical

records say. It says perhaps, could have been; but it's not necessarily so. It could be. There are no clear fractures. But there is still injury to this child. And some of it might be secondary due to old trauma that we aren't concerned about in terms of this case. There is no definite acute fractures. And this child does have apparently a hereditary disease that also affects the bones.

....

And I have no other information other than this medical record that is credible and reliable that anything else happened.

So, I am not going to conclude there were broken bones. I don't have the evidence to do that.

¶9 Despite the State's attempt to argue otherwise, the information presented at Williams' sentencing was unquestionably inaccurate. The State and the PSI here indicated the child abuse victim had suffered fractures as a result of the assault underlying Williams' child abuse conviction. There was no such assertion, much less evidence of resulting fractures, in the child abuse case. Rather, the only claim—which Judge Bischel rejected—was that the victim had *previously* suffered fractures.

Whether the sentencing court actually relied on inaccurate information

¶10 In support of his argument that the sentencing court relied on the inaccurate information regarding fractures, Williams relates the following sentencing remarks:

I think the agent had it correct when she prepared the report saying that you've had a history of assaultive behavior.

....

Looking at your personality, character and social traits, clearly this anger and assaultive behavior is a deficit for you, and it is something that you need to deal with.

....

You, sir, are a dangerous man.

....

Your record, as the agent has indicated, is as follows: Mr. Williams is a dangerous individual. He needs to be held accountable for his continued highly assaultive and demeaning physical and mental behavior toward others.

....

You had prior assaultive behavior that has been the result—that has led to convictions.

¶11 We disagree with Williams that the foregoing comments demonstrate, by clear and convincing evidence, that the sentencing court relied on the assertion Williams fractured the child victim's ankle or wrist. As indicated, the test for actual reliance is “whether the court gave ‘explicit attention’ or ‘specific consideration’ to ... the misinformation[.]” *Tiepelman*, 291 Wis. 2d 179, ¶14. The court did not specifically reference the child abuse case or victim, not to mention whether the child suffered any physical injuries or, if so, the type or extent thereof. Rather, the court commented only that Williams had a history of assaultive behavior, which was entirely accurate.

¶12 Moreover, a full review of the court's sentencing comments reveals a focus on Williams' despicable behavior, not his victims' physical injuries. For example, the sentencing court's dangerousness comments were presented in the following context:

I'm aware of your contention that you didn't do the things that are depicted in those exhibits.

But I don't believe you. ... You, sir, are a dangerous man. You know, I've had the opportunity or the responsibility for presiding over several significant felony cases, and each one is bad in its own right. But you reserve a classification separate from the homicidal people, separate from the assaulters of a woman's sexual privacy.

The court next discussed the controlling and demeaning behavior directed at the victim in this case—without discussing any physical harm. The court then indicated, “Now, you, sir, based on that, are a dangerous individual, and that’s scary. ... And this isn’t as if you in a fit of rage on one occasion did this.” Having reviewed both the court’s sentencing comments and the PSI, we conclude Williams falls far short of his burden to prove it is “highly probable” or “reasonably certain” that the sentencing court actually relied on the misinformation regarding the child victim’s fractures. *See Harris*, 326 Wis. 2d 685, ¶35.

¶13 Finally, we observe Williams should probably be grateful we have rejected his argument, because, frankly, the truth is more prejudicial than the fiction of which he complains. At sentencing in this case, the court did not hear the details of Williams’ prior assault on the twelve-year-old victim. It heard only the title of the crime and the erroneous fact that the assault resulted in fractures. At a resentencing, it is probable the court would hear the rest of the story. The sentencing transcript from the child abuse case was not introduced in this case until the postconviction proceedings. In the earlier case, Judge Bischel explained why the case was serious despite the lack of fractures:

So, I am not going to conclude there were broken bones. I don’t have the evidence to do that. But what this Complaint says is that he was tied by his wrists and ankles to the bed, laying on his stomach, and beaten by the Defendant with a stick. And he was re-tied to make the restraint even tighter. That the door was closed, so that other people might not hear or intervene. That the defendant left for a while and came back and did it some more. That he had been, you know, another child reporting that even the belt and shoe strings had been used. That the child ... was naked at the time.

Clearly, the PSI in the present case was accurate when reporting Williams had a history of abusive behavior.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

